Beverly Health and Rehabilitation Services, Inc. and Its wholly-owned subsidiary, Beverly Enterprises–Alabama, Inc. d/b/a Beverly Healthcare–Oneonta, a Single Employer *and* United Food and Commercial Workers Union, Local 1657

Beverly Enterprises–Alabama, Inc. d/b/a Beverly Healthcare–Oneonta, a Single Employer *and* United Food and Commercial Workers Union, Local 1657. Cases 10–CA–32797 and 10–RC–15153

August 21, 2003

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On November 29, 2001, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about her union activity and the union activity of other employees (cplt. 13), by threatening employees with loss of benefits if they supported the Union (cplt. 14), threatening employees with adverse changes in working conditions if they chose union representation (cplt. 15), and by soliciting employee grievances and impliedly promising to remedy them if employees ceased supporting the Union (cplt. 16–17).[3] We agree with the judge.[4] We also agree with the judge that the violations which occurred during the critical period constituted objectionable conduct and that a second election is warranted.[5] In addition, although we agree with the judge that Respondent's shown proclivity to violate the Act justifies a broad order,[6] we do not agree with the judge that a corporatewide order and notice posting provisions are necessary in this case.

As justification for a corporatewide remedy, the judge noted that the Respondent had stipulated that it was a single-integrated enterprise. He found based on prior Board precedent that the Respondent had both a proclivity to violate the Act and a sustained corporate-level union animus. And he noted that Alabama Group Human Resources Manager Mike McKelvaine, a Respondent official above the facility level, committed at least two of the violations.

Although the Board has ordered corporatewide remedies in other cases involving this Respondent, this case is distinguishable. In those cases, the Respondent committed multiple violations at multiple locations with high-ranking corporate and regional officials either visiting the facilities at issue and playing a role in the unlawful

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). We shall also conform the judge's recommended Order and notice to the violations found by the judge. In this respect, we note that the judge found in his recommended order and notice that the Respondent had promised benefits to employees to dissuade them from supporting the Union. However, the violation at issue involved Alabama Group Human Resources Manager Mike McKelvaine's telling employees at a meeting that the Union could not help employees, and that McKelvaine knew their problems and would stick around and help employees with their problems. This violation is a solicitation of grievances with an implied promise to remedy them. See *Alamo Rent-A-Car*, 338 NLRB 275, 277, 284–286, 287 (2002). Accordingly, we find it unnecessary to reach the statement made by Oneonta Facility Director of Nursing Glenda Burns telling employees at a meeting that Burns knew employees had problems, that the Respondent was working on fixing them, and that the Union wasn't the way to go. The judge relied on both McKelvaine's and Burns' statements in making his finding of a violation. However, any violation predicated on Burns' statement would be cumulative and does not affect the remedy or the order.

[3] No exceptions have been filed to the judge's findings that the Respondent did not violate Sec. 8(a)(1) by soliciting employees to refrain from supporting the Union, by asking an employee to get another employee to back off from supporting the Union, and by threatening adverse changes in working conditions if employees selected a union (Licensed Practical Nurse Shelby Walker's statement to an employee that "we could lose a lot of our benefits if they got the Union in there. That we may not have our vacation days and holidays. We got cheaper lunches and just different things that we already have now that we could lose them if the Union came in and was negotiating a contract").

[4] Chairman Battista would find violations as to complaint allegation pars. 13–16, but would not find a violation as to complaint allegation par. 17, for reasons detailed above (fn. 2).

[5] In finding that a new election is warranted due to the Respondent's objectionable conduct, we rely only on conduct set forth in complaint pars. 14 and 16. In agreement with the judge, we do not rely on the conduct set forth in complaint par. 13, as it occurred prepetition. We also find it unnecessary to reach whether the conduct set forth in complaint par. 15 occurred in the critical period as this determination does not affect our order of a second election. Finally, we do not rely on the conduct set forth in complaint par. 17 regarding Burns for the reasons set forth in fn. 2 above.

[6] *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 640 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003).

conduct, or taking prominent roles in directing, approving, or knowingly failing to prevent unlawful actions.[7] Here, the Respondent committed three types of unfair labor practices at one facility with a state manager being the perpetrator in two instances. As such, this case involves discrete violations at an individual facility, and, as in other similar cases involving this Respondent, traditional remedies are warranted.[8] We so order here.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Beverly Health and Rehabilitation Services, Inc. and its wholly-owned subsidiary, Beverly Enterprises-Alabama, Inc. d/b/a Beverly Healthcare-Oneonta, Oneonta, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union sentiments and desires and the union sentiments and desires of other employees.

(b) Threatening employees with adverse changes in working conditions if they chose union representation.

(c) Threatening employees that they would lose benefits if they supported the Union.

(d) Soliciting grievances from employees and impliedly promising to remedy them.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Oneonta, Alabama, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held in Case 10–RC–15153 be, and it is, set aside, and that the case be, and it is, remanded to the Regional Director for Region 10 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, dissenting in part.[1]

In *Beverly Health & Rehabilitation Services* (commonly known as *Beverly IV*), 335 NLRB 635 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003), the Board ordered a corporatewide remedy against this Respondent.[2] In *Beverly IV*, we held that

[7] *Beverly Health & Rehabilitation Services*, supra; *Beverly California Corp. (Beverly III)*, 326 NLRB 232 (1998), enfd. in part and remanded 227 F.3d 817 (7th Cir. 2000); *Beverly California Corp. (Beverly II)*, 326 NLRB 153 (1998), enfd. 227 F.3d 817 (7th Cir. 2000); *Beverly Enterprises (Beverly I)*, 310 NLRB 222 (1993), enf. denied in relevant part sub nom. *Torrington Extend-A-Care Employees Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994).

[8] *New Madrid Nursing Center*, 325 NLRB 897, 903 fn. 33 (1998), and cases cited therein, enfd. 187 F.3d 769 (8th Cir. 1999).

[9] In finding that a corporatewide remedy is not warranted, we distinguish *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001) (*Beverly IV*), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003), from the instant case. In *Beverly IV*, the Board explicitly named five "high ranking corporate and regional officials who played prominent roles in directing, approving, or knowingly failing to prevent unlawful actions," including the company president, two vice presidents, and two regional managers. 335 NLRB at 639. By contrast, we have no such evidence of high-level management involvement in the unlawful conduct in this case. Indeed, our dissenting colleague can only say that there is a "likelihood" that the unlawful conduct emanated from a central source. That "likelihood" is not supported by concrete evidence of central direction. Contrary to the view of our dissenting colleague, the involvement of one state human resources manager, who is not alleged to have had any involvement in corporate policy making, does not provide that support.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree with the majority opinion, except for its denial of a corporatewide remedy.

[2] Respondent Beverly Healthcare-Oneonta has stipulated that it is a single-integrated business enterprise with Beverly Health and Rehabilitation Services, Inc.

> where we determine that a respondent is a single employer with a proclivity for violating the Act, we have necessarily determined that the unfair labor practices found have generally emanated from a central source. . . . [A]lthough the respondent's propensity to violate the Act was manifested primarily where employees happened to exercise their Section 7 rights, the propensity exists corporatewide. This militates in favor of issuing a single, comprehensive remedial order and notice which will have a deterrent effect at all the respondent's facilities. [335 NLRB at 642.]

As the judge found in the present case, the credited evidence is consistent with the likelihood that the unfair labor practices emanated from a central source. As detailed by the judge, as well as in *Beverly IV*, supra, the Respondent has shown a propensity for violating the Act. Indeed, the majority does not take issue with the judge's finding that the violations here are similar to unlawful statements which the Respondent's agents have made to other employees at other locations, and it is noteworthy that the unfair labor practices here occurred during the pendency of *Beverly IV*. The violations here also include the commission of unfair labor practices by the Respondent's Alabama group resources manager, who was on hand to explain the Respondent's position on unionization to groups of employees. Thus, it is apparent that the unfair labor practices were not confined to local officials but, on the contrary, included the commission of unfair labor practices by a high-ranking regional official of the Respondent.

In these circumstances, it is puzzling that the majority concludes that the violations in this case are merely local in character and no more than "discrete violations at an individual facility." It seems that the majority infers that the regional corporate official who visited this facility and committed unfair labor practices was acting alone and on an ad hoc basis. In my view, the opposite inference is warranted. It seems far more likely that the regional manager was present at this facility for a reason, namely, to implement the Respondent's corporate labor policies and to conduct himself in a manner consistent with those policies. To that end, he was successful. Further, issuance of a corporatewide remedy is consistent with our findings in *Beverly IV*, supra, and promotes the likelihood that our remedies will have a deterrent effect at all the Respondent's facilities. Accordingly, contrary to the majority, I would find that corporatewide remedies are appropriate.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees regarding their union sentiments and desires and the union sentiments and desires of other employees.

WE WILL NOT threaten employees with adverse changes in working conditions if they choose union representation.

WE WILL NOT threaten employees that they would lose benefits if they supported the Union.

WE WILL NOT solicit grievances from employees and impliedly promise to remedy them.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC. AND ITS WHOLLY-OWNED SUBSIDIARY, BEVERLY ENTERPRISES-ALABAMA, INC. D/B/A BEVERLY HEALTHCARE-ONEONTA

John D. Doyle, Jr., Esq., for the General Counsel.
Keith R. Jewell, Esq., of Fort Smith, Arkansas, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on October 17, 2001, in Birmingham, Alabama. After the parties rested, I heard oral argument, and on October 18, 2001, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attached as "Appendix A," the portion of the transcript contain-

ing this decision.[1] The remedy, conclusions of law, recommended order, and notice provisions are set forth below.[2]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as "Appendix B."

Additionally, the General Counsel seeks, and Respondent opposes, a "corporatewide" remedy, that is, an order which applies to all of Respondent's management and facilities, and a notice to be posted at all of Respondent's facilities. So that I could give their arguments further consideration, my bench decision deferred ruling on this issue.

The General Counsel alleged in complaint paragraph 8 that Respondent Beverly Health and Rehabilitation Services and Respondent Oneonta constituted a single-integrated business enterprise which, among other things, "have formulated and administered a common labor policy affecting employees of said operations." Respondent denied this allegation, but at hearing it entered into stipulation in which it agreed that the single-employer status issue was res judicata, and in which it consented to a finding "that its nursing home operations are a single integrated employer for National Labor Relations Act purposes."

The stipulation acknowledges that this issue, whether Respondent and its subsidiaries constitute a single-integrated business enterprise, has already been litigated, and I take notice of these prior decisions, including the Board's recent decision in *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001). Based upon these findings, as well as the record in the present case, I conclude that a corporatewide remedy is appropriate and necessary.

The appropriateness of such a corporatewide remedy does not depend on whether a corporation's top management participated in or directed the commission of unfair labor practices at the particular facility involved in the specific case under consideration. Rather, the appropriateness of a corporatewide remedy turns on the respondent's proclivity to violate the Act on a corporatewide basis. In *Beverly Health & Rehabilitation Services*, the Board stated:

> [O]nce a single employer is shown to have established a pervasive corporate environment in which local management is encouraged and even expected to violate the Act, we may fairly presume for the purpose of remedy that all the violations found are at least in part attributable to that environment.

335 NLRB 642. Although the evidence in the present case does not establish, by itself, "a pervasive corporate environment in which local management is encouraged and even expected to violate the Act," evidence in recent cases led the Board to conclude that this same Respondent has precisely such a corporate environment.

In *Beverly Health & Rehabilitation Services*, supra, the Board relied upon both the record before it and upon its prior findings in *Beverly California Corp.*, 326 NLRB 232 (1998) (*Beverly II*"), to find Respondent's corporate-level officials responsible for the unfair labor practice committed at particular locations. The Board stated:

> In this case, we have not only the now-familiar pattern of involvement of the Respondent's corporate personnel in the unlawful actions found to have occurred, but convincing documentary evidence of the Respondent's corporatewide responsibility for almost all of its actions pertaining to its employees' protected activities.

335 NLRB 639. The Board issued its decision in *Beverly Health & Rehabilitation Services* less than 3 months ago, and it was not the first decision in which the Board has concluded that this Respondent's unfair labor practices warranted a corporatewide remedy. See *Beverly California Corp.*, 334 NLRB 713 (2001).

In view of these recent cases, there is no reason to believe that the unfair labor practices in the present case were isolated acts unconnected to Respondent's unfair labor practices elsewhere. As the Board has stated:

> [W]here we determine that a respondent is a single employer with a proclivity for violating the Act, we have necessarily determined that the unfair labor practices found have generally emanated from a central source. The particular location where employees engaged in Section 7 activity consequently had little or no bearing on the respondent's decision to respond in an unlawful manner; the respondent would presumably have committed the same or similar violations regardless of where the protected activity occurred.

335 NLRB 642. The present record doesn't demonstrate that, in committing the unfair labor practices found here, local supervisors and managers were puppets and corporate-level managers pulled the strings. But such a showing is not necessary. Based on the Board's recent decisions finding corporatewide animus, it may be presumed that the unfair labor practices here emanated from a central source. The credible evidence before me does not rebut such a presumption. To the contrary, it is consistent with this presumption.

Thus, a corporate official above the facility level, Alabama Group Human Resources Manager Mike McKelvaine, committed two of the unfair labor practices alleged in the complaint. He did so by making unlawful statements during meetings called to inform employees of the Respondent's position on unionization. The fact that a member of higher management came to the particular facility to counter the Union's organizing

[1] The bench decision appears in uncorrected form at pp. 193 through 224 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

[2] Sec. 102.45 of the Board's Rules provides, in part, that if the administrative law judge issues a bench decision, "promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing this decision; file with the Board a certified copy of those pages . . . and cause a copy thereof to be served on each of the parties." Customarily, the Division of Judges receives the transcript of hearing from the court reporting service after 14 days, but in this case, there was a delay in receipt of the transcript which resulted in some delay in filing this certification.

campaign clearly indicates that management at the corporate level, and not merely the facility level, took the initiative.

It may be argued that the violations found in this case are not as egregious as those found by the Board in other cases involving this Respondent. However, in considering the appropriateness of a corporatewide remedy, I am concerned not with severity but with source.

By analogy, if an industrial plant were discharging a poison into a waterway, the chemical would appear at different concentrations at various locations. At some points, the concentration might be high enough to kill all fish, while at other points, the harmful effects might be less extreme. When a pollutant is emanating from a central location, the need to stop it does not depend upon the toxicity measured at one particular spot but rather upon the potential harm it may cause throughout the ecosystem.

Numerous Board proceedings have demonstrated that the animus manifested at Respondent's various facilities has a central source. Despite prior Board orders, this animus has continued to flow, becoming apparent whenever and wherever Respondent's employees engage in protected concerted activities. The animus demonstrated at the Respondent's Oneonta facility is only the latest outbreak.

For the reasons discussed above, I conclude that a corporatewide remedy is both appropriate and necessary. In *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001), the Board required this Respondent to post two separate notices, one at its facilities in Pennsylvania, and the other notice at Respondent's other facilities. The conduct found violative in the present case, however, does not concern discrimination against specific employees at Respondent's Oneonta facility. Rather, it involves violations of Section 8(a)(1) similar to statements which Respondent's agents have made to other employees at other locations. Therefore, I conclude that it is appropriate to require Respondent to post the same notice at all locations.

Because Respondent has demonstrated a proclivity for violating the Act, I also conclude that a broad cease-and-desist order prohibiting Respondent from interfering with, restraining, or coercing employees in the exercise of Section 7 rights in any other manner is warranted.

Additionally, as stated in the bench decision, I recommend that the Board set aside the September 7, 2000 secret-ballot election and direct that a new election be conducted. Further, to minimize delay, I recommend that the Board sever Case 10–RC–15153 and remand it to the Regional Director so that a new election may be conducted.

CONCLUSIONS OF LAW

1. Beverly Health and Rehabilitation Services, Inc., and its wholly-owned subsidiaries, including Beverly Enterprises Alabama, Inc. d/b/a Beverly Healthcare-Oneonta, and each of them have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of the operations; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise.

2. The Respondent, Beverly Health and Rehabilitation Services, Inc., and its wholly-owned subsidiaries, including Beverly Enterprises Alabama, Inc. d/b/a Beverly Healthcare-Oneonta, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Charging Party, United Food and Commercial Workers Union, Local 1657, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by the following actions:

(a) Coercively interrogating employees regarding their union sentiments and desires and the union sentiments and desires of other employees.

(b) Threatening employees that they would lose benefits if they supported the Union.

(c) Soliciting grievances from employees for purposes of redress.

(d) Promising benefits to employees to dissuade them from supporting the Union.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

[Recommended Order omitted from publication.]

APPENDIX A

This is a bench decision in the case of Beverly Heath and Rehabilitation Services, Inc., and its Wholly–Owned Subsidiary Beverly Enterprises Alabama, Inc. d/b/a Beverly Healthcare–Oneonta, which I will call the "Employer" or "Respondent," and United Food and Commercial Workers Union, Local 1657, AFL–CIO, which I will call the "Union" or the "Charging Party." The case numbers are 10–CA–32797 and 10–RC–15153.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the General Counsel has proven most, although not all, of the Section 8(a)(1) allegations in the Complaint. Further, I find that these violations constitute objectionable conduct which warrants setting aside the election and direction of a new one.

Procedural History

This case concerns events leading up to an election conducted by the National Labor Relations Board, which I will call the Board, In Case 10–CA–15153, the Union filed a representation petition in this case on July 27, 2000. It entered into a Stipulated Election Agreement with the Employer which provided for a secret ballot election in which employees in the following unit were eligible to vote:

> All full-time and regular part-time nursing assistants, cooks, dietary aides, housekeeping, laundry employees, central supply clerk, activity department assistants, and maintenance assistants employed by the employer at its 215 Valley Road, Oneonta, Alabama facility, but excluding all registered nurses, licensed practical nurses, activity department director, social services coordinator, registered dietitian, dietary man-

> ager, maintenance supervisor, department heads, office clerical employees, temporary and casual employees, professional employees, guards, managers and supervisors as defined in the Act.

On September 7, 2000, the Board conducted the secret ballot election. The tally of ballots showed that of approximately 70 eligible voters, 32 cast valid votes for and 34 cast valid votes against the Union. There was one challenged ballot and one void ballot. The challenged ballots were not sufficient in number to affect the results of the election.

On September 12, 2000, the Union filed timely objections to the election, which were duly served on the Employer.

On November 29, 2000, the Union filed an unfair labor practice charge against the Employer in Case 10–CA–32797. On March 30, 2001, after investigation of the charge, the Regional Director of Region 10 issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

The Complaint and the Union's Objections to the election concern the same alleged acts. The Complaint alleges these acts to be unfair labor practices. The Objections assert that this same alleged conduct tainted the September 7, 2000 election and that the Board should set this election aside and conduct a new one.

On April 19, 2001, the Regional Director of Region 10 issued an Order which consolidated Case 10–RC–15153 with Case 10–CA–32797 and directed a hearing before an administrative law judge. On October 17, 2001, that hearing opened before me in Birmingham, Alabama. After the General Counsel and Respondent had presented evidence, counsel for each gave oral argument. Today, October 18, 2001, I am issuing this bench decision.

Admitted Allegations

Respondent's Answer to the Complaint admitted a number of allegations. Based on these admissions, I find that the General Counsel has proven the allegations raised in Complaint paragraphs 1(a), 1(b), 3, 4, 5, 6, 7, 10, 11, and 12. More specifically, I find that at all material times, Respondent Beverly Health and Rehabilitation Services, Inc. and each of its wholly–owned subsidiaries and individual facilities identified in the Complaint, was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that each was a health care institution within the meaning of Section 2(14) of the Act.

Further, I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that the following individuals are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Licensed Practical Nurses Jerry Nichols, Shelby Walker and Joan Mize; Alabama Group Human Resources Manager Mike McKelvaine. Oneonta Facility Director of Nursing Glenda Burns; Oneonta Facility Executive Director Laurel (Lollie) Massey.

Respondent's Status as Single Integrated Enterprise

Respondent's Answer partially denied the allegations raised in Complaint paragraphs 2, 8, and 9, which pertain to the relationship between Respondent and its wholly–owned subsidiaries and individual facilities. Referring to Beverly Health and Rehabilitation Services, Inc. as "Respondent BHR," Complaint paragraph 8 alleges as follows:

> At all material times herein, Respondent BHR and its wholly-owned subsidiaries including Respondent Oneonta, and individual facilities, and each of them have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

Complaint paragraph 9 alleges as follows:

> By virtue of its operations described above, Respondent BHR and its wholly-owned subsidiaries including Respondent Oneonta, and individual facilities constitute a single integrated business enterprise and a single employer within the meaning of the Act.

At hearing, the General Counsel and Respondent entered into a stipulation regarding these allegations. The stipulation states, in part, as follows:

> Respondent, although it still contends that it is not a single integrated employer for National Labor Relations Act purposes or any other purposes, hereby acknowledges, stipulates and agrees that the issue of Respondent's single employer status under the National Labor Relations Act is *res judicata*. Pursuant to the administrative and judicial determinations made on full records which are substantially similar to the facts as they now are, Respondent expressly consents to a finding in the above-referenced case by the National Labor Relations Board and any reviewing court that its nursing home operations are a single integrated employer for National Labor Relations Act purposes.
>
> Both Respondent and Counsel for the General Counsel hereby expressly acknowledge that this stipulation does *not* constitute a waiver by Beverly of any other arguments regarding the propriety of the nation-wide cease and desist order sought by the General Counsel. Both Respondent and Counsel for the General Counsel hereby expressly acknowledge that this stipulation has no effect whatsoever beyond the case captioned hereinabove.

Based upon this stipulation and the record as a whole, I find that Respondent Beverly Health and Rehabilitation Services, Inc., and its wholly-owned subsidiaries including Respondent Oneonta, and individual facilities constitute a single integrated business enterprise and a single employer within the meaning of the Act, as alleged in Complaint paragraph 9.

Legal Standards to Be Applied

In determining whether statements by Respondent's representatives interfere with, restrain or coerce employees in the exercise of Section 7 rights, I will apply an objective standard. Under this standard, the intent of the person who made the statement is not relevant. Neither is the effect of the statement on a particular person. In other words, it is irrelevant that a statement may not have chilled the union activities of the person who heard it, or changed the way this employee voted in the election. Rather, the lawfulness of the statement must be judged by the effect it reasonable would have on employees.

In determining whether a particular statement constitutes objectionable conduct warranting setting aside the election, I will apply a similar objective standard. See *Hopkins Nursing Care Center*, 309 NLRB 958 (1992).

Unfair Labor Practice Allegations

Complaint Paragraph 13

Complaint paragraph 13 alleges that on or about June 27, 2000, Respondent, by its agent Jerry Nichols, at Respondent's Oneonta, Alabama facility, coercively interrogated employees regarding their union sentiments and desires and the union sentiments and desires of other employees. Respondent denies this allegation.

Respondent's employee Juanita Middlebrook, a nursing assistant, testified that on one occasion when she came out of a patient's room, Licensed Practical Nurse Nichols called her over to the medicine cart, where he was standing. According to Middlebrook, Nichols asked if she knew who was behind bringing the Union in. Middlebrook replied that she wouldn't say. Middlebrook testified that Nichols said, "You can tell me, I won't tell nobody," but that she just walked away.

When Nichols testified, Respondent asked him if he "had any occasion" to ask employees about other employees' union activities. Nichols answered, tersely and simply, "no." When asked specifically if he "had occasion to speak to Juanita Middlebrook" about how other employees felt about the Union, he answered "No, not myself, no."

I do not credit Nichols' denial. At the time they testified, both Nichols and Middlebrook were still employed by Respondent. Therefore, they both had some incentive to testify in a manner favorable to Respondent. Yet Middlebrook's testimony could result in a finding that Respondent violated the law. Middlebrook would have no reason to give such testimony if it were not true.

Moreover, Nichols' denial is rather vague. Nichols denied having occasion to ask Middlebrook about the union activities of other employees. Such a denial is not quite the same as denying that he actually did ask Middlebrook the question.

Additionally, based on my observations of the witnesses, I conclude that Middlebrook was more credible. For all these reasons, I credit her testimony, rather than Nichols', and find that Nichols did make the statement which Middlebrook attributed to him.

In determining whether Nichols' question to Middlebrook violated the Act, I draw on the guidance of *SAIA Motor Freight, Inc.*, 334 NLRB No. 124 [979] (August 7, 2001). As discussed in that case, to determine whether an interrogation violated the Act, the Board considers the following factors: the background in which the questioning occurs, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether the employee involved was an open and active union supporter.

Several of these factors militate in favor of finding the questioning violative. When Nichols interrogated Middlebrook, the Union was trying to organize the employees. Nichols sought the identity of the individuals behind the Union's effort. Nichols was an admitted supervisor and agent of Respondent who attended meetings at which other supervisors discussed the Union organizing drive. Further, the record fails to establish that Middlebrook was an open and active union supporter. All of these facts suggest that the questioning interfered with, restrained and coerced employees in the exercise of their Section 7 rights.

On the other hand, the interrogation did not take place in a locus of management authority. Rather, Nichols posed the question to Middlebrook in the hallway of the facility, next to the medicine cart. Additionally, Nichols is not a higher management official but a first-line supervisor.

I conclude that the factors militating in favor of finding a violation outweigh those against finding a violation. In the context of a union organizing campaign, questioning an employee about the identity of union supporters is highly coercive. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act, as alleged in Complaint paragraph 13.

Complaint Paragraph 14

Complaint paragraph 14, as amended at hearing, alleges that sometime during the period July 1, 2000 to September 7, 2000, the exact date presently unknown to the Acting General Counsel but well known to Respondent, Respondent, by its agent Mike McKelvaine, at Respondent's Oneonta, Alabama facility, threatened employees that they would lose benefits if they supported the Union. Respondent denies this allegation.

During the union organizing campaign, management held meetings to present its position to employees. The Alabama Group human resources manager, Mike McKelvaine, conducted or participated in some of these meetings. Respondent has admitted that McKelvaine is its supervisor and agent. McKelvaine denied telling employees that they would lose benefits if they selected the Union.

While working at Respondent's facility, nursing assistant Nora Harper attended some of these meetings. According to Harper, McKelvaine told the employees attending that if the union came in, they would lose the Blue Cross/Blue Shield insurance, and that they would have to get the union insurance, which wasn't as good as Blue Cross.

Harper's pretrial affidavit, which was placed in evidence, is consistent with her testimony at hearing. Based on this consistency, as well as my observations of the witnesses as they testified, I credit Harper's testimony about this matter.

Another nursing assistant, Sarah Fowler, also attended meetings at which McKelvaine spoke. Fowler testified that McKelvaine told employees that their insurance would not be the

same and that some benefits would change if the Union were selected.

Fowler gave a pretrial affidavit and also provided the General Counsel another handwritten statement. These statements do not mention McKelvaine telling employees that their insurance would not be the same or that some benefits would change. Moreover, her affidavit states that McKelvaine "did not make any specific promises or threats."

In some circumstances, the differences between Fowler's testimony and her pretrial affidavit might raise questions about the reliability of her testimony. Those circumstances are not present here. Although her affidavit does state that McKelvaine did not make any specific threats, it does not elaborate on the meaning of the word "threat." Ordinarily, that word carries a somewhat menacing connotation, and it is not clear that the affiant would consider a statement about a change in insurance benefits to be the kind of overtly hostile behavior commonly associated with a threat.

Based on my observations of the witnesses, I conclude that Fowler's testimony is reliable and I credit it.

Another nursing assistant, Janet Sherbet, testified that she attended a meeting at which McKelvaine spoke. According to Sherbet, McKelvaine said, "we could lose a lot of our benefits if we got a union in there when they were negotiating contracts, and just things like that, if we had problems that they could work 'em out, somehow."

Respondent called a nursing assistant, Erin Dingler, who attended one or two of the meetings conducted by McKelvaine. She testified that McKelvaine did not discuss what would happen to benefits if the employees selected a union. She also did not recall McKelvaine mentioning insurance.

In examining this testimony, it is important to keep in mind that Respondent conducted a number of meetings at which McKelvaine spoke. What McKelvaine said at a meeting attended by one witness might not be identical to what he said at another meeting attended by other witnesses. Thus, the fact that employee Dingler did not hear McKelvaine make a violative statement does not foreclose the possibility that he did so at another meeting she did not attend.

Relying on Harper's testimony, which I credit, I find that at a meeting she attended, McKelvaine told employees that if the union came in, they would lose the Blue Cross/Blue Shield insurance, and that they would have to get the union insurance which wasn't as good as Blue Cross. The record does not establish that McKelvaine made any statement to qualify or explain a change of insurance benefits as simply a possible outcome of the collective-bargaining process. To the contrary, Harper quoted McKelvaine as making the flat statement that employees *would* lose their Blue Cross/Blue Shield insurance and *would* have to obtain the Union's insurance which wasn't as good. Clearly, that was the message communicated to Harper and the message she understood.

Similarly, the credited testimony of Sarah Fowler establishes that at a meeting she attended, McKelvaine said that if the Union were selected, the employees' insurance would not be the same or that some benefits would change. Again, Fowler's testimony does not show that McKelvaine described this change as a possible outcome of the collective-bargaining process rather than the inevitable result of selecting the Union.

I conclude that the statements McKelvaine made to employees at the meetings attended by Harper and Fowler interfered with, restrained and coerced employees in the exercise of their Section 7 rights. Therefore, I recommend that the Board find that these statements violated Section 8(a)(1) of the Act. Further, I recommend that the Board find that these statements, made during the critical period, warrant setting aside the election and directing that another be conducted.

On the other hand, I do not conclude that McKelvaine violated the Act by making the statement attributed to him by employee Sherbet. She testified that McKelvaine told the employees "we could lose a lot of our benefits if we got a union in there when they were negotiating contracts. . ."

Based on my observations of the witnesses, I find that Sherbet testified honestly, but that her mind had abstracted and condensed McKelvaine's comments considerably before it saved them to long term memory. Her recollection that McKelvaine told employees they *could* lose a lot of benefits "when they were negotiating contracts" suggests that on this occasion, McKelvaine did explain that a change in benefits could result from the bargaining process.

Sherbet's recollection, standing alone, is not sufficient to support a finding that Respondent violated the Act. I do not rely upon it in concluding that Respondent committed the unfair labor practice alleged in Complaint paragraph 14.

Complaint Paragraph 15

Complaint paragraph 15 alleges that sometime in August and September 2000, on dates not presently known to the Acting General Counsel but well known to Respondent, Respondent, by its agents Shelby Walker and Glenda Burns, at Respondent's Oneonta, Alabama facility, threatened employees with adverse changes in working conditions if they chose Union representation. Respondent denies this allegation.

Respondent has admitted that Walker is its supervisor and agent. Walker schedules employees for work. To request a day off, a nursing assistant goes to Walker, who typically grants the request.

Sarah Fowler testified that on one occasion, she requested that Walker give her a day off. According to Fowler, Walker granted the request but said that once the Union got in, the schedule would remain the same and that she, Walker, would not be able to change it. Fowler provided a consistent account of this incident in her pretrial affidavit.

Walker denied making this statement to Fowler. Based upon my observations of the witnesses, I credit Fowler's testimony and find that Walker did make the statement which Fowler attributed to her.

Further, I conclude that this statement—that once the Union got in, the schedule would remain the same and that she, Walker, would not be able to change it—interferes with, restrains and coerces employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act. Walker did not qualify the statement to indicate that, as a result of the collective-bargaining process, certain benefits and working condi-

tions would change. Rather, Walker linked the change in benefits directly to the selection of the Union.

Additionally, Walker made this statement during the critical period. I recommend that the Board find that the statement constitutes objectionable conduct warranting setting aside the election and directing a new one.

Employee Janet Sherbet testified that the day before the election, she heard Walker tell another employee that she, Walker, had four weeks vacation and "would sure hate to lose it if the Union came in, she felt like she would."

Sherbet further testified that during this same conversation, Walker told the other employee "that if we got the Union in, that it would be run more like a business, it wouldn't be like a family place anymore." Sherbet quoted Walker as saying that the nurses had been told they wouldn't be able to "pal around" with the nursing assistants because the Union "might do something to 'em if they did."

According to Sherbet, Walker said that "we could lose a lot of our benefits if they got the Union in there, that we may have our vacation days and our. . .holidays, we got cheaper lunches and just different things that we already have now that we could lose 'em if the Union came in negotiating a contract."

Rather emphatically, Walker testified that she never discussed anything with Sherbet because "she was not the type to discuss anything with" and because Sherbet was angry most of the time. But Walker's denial that she discussed the Union with Sherbet is not quite a denial that she made the statements which Sherbet attributed to her. Sherbet did not testify that Walker made the statements directly to her, Sherbet, but rather that Walker made the statements to another employee in Sherbet's presence.

Walker's testimony falls short of a flat denial in another respect. She testified that she did not recall making any statements concerning the way a Union's presence would affect the relationships between employees and supervisors. But she admitted saying that "we would have a third party that would, you know, be in between everybody."

Considering that Walker did not squarely deny the statements attributed to her by Sherbet, and based upon my observations of the witnesses, I credit Sherbet's testimony, rather than Walker's. Relying on that testimony, I find that Walker told employees that if the Union came in, the facility would be run "more like a business" and wouldn't be a "family place" any more. Further, I find that Walker said that the nurses had been told that if the Union came in, the nurses would not be able to "pal around" with the nursing assistants because the Union might "do something" to them.

If Walker's comments that the facility would be run "more like a business" and would not be a "family place" any more stood by themselves, I would not recommend that the Board find a violation. However, they must be considered in light of Walker's additional statement that the nurses would not be able to "pal around" with the nursing assistants because the Union might "do something" to them. This latter statement clearly conveys any change in the family atmosphere of the staff would result not from structure imposed by a negotiated collective-bargaining agreement, but from Union action directed at the nurses. The statement that the Union might "do something" to the nurses implies that the Union would act with malicious intent to destroy friendships rather than from legitimate purpose related to collective bargaining.

In these circumstances, I conclude that Walker's comments violate Section 8(a)(1) of the Act. Further, I conclude that they interfere with the laboratory conditions necessary for free and uncoerced choice. Because Walker made the statements during the critical period, I recommend that the Board find them to constitute objectionable conduct.

Based on Sherbet's credited testimony, I have also found that Walker told an employee "we could lose a lot of our benefits if they got the Union in there, that we may have our vacation days and our . . . holidays, we got cheaper lunches and just different things that we already have now that we could lose 'em if the Union came in negotiating a contract."

Walker did not say that the employees *would* lose benefits but only that they *could*, and she tied such possible changes to negotiations for a collective–bargaining agreement. I conclude that the statement falls short of interfering with, restraining or coercing the employees in the exercise of Section 7 rights. I do not recommend that the Board find that this statement violates Section 8(a)(1) or constitutes objectionable conduct.

Employee Nora Harper testified that Director of Nursing Glenda Burns commented to her that if the Union came in, things would "only get worse" and that in bargaining, if the Union "got something, they would only take something away." Harper's pretrial affidavit, and her handwritten statement attached to it, do not mention Burns making the statement Harper described in her testimony. Moreover, Harper's affidavit states, in part, as follows:

> Attached to this affidavit is a two-page handwritten statement which I prepared. The information in that statement is true and accurate to the best of my knowledge and belief.
>
> Other than the above, I have not heard any Beverly Supervisor, Manager or other official say anything to anyone or ask anyone anything about the Union.

Thus, Harper's affidavit contradicts her testimony. Therefore, I do not credit her testimony on this point, although as already noted, I credited her testimony on another point.

Burns testified that she recalled having a conversation in which she discussed benefits with an employee, but she was not sure whether that employee was Nora Harper. According to Burns, she told the employee that if a Union were selected, benefits would be negotiated. She denied telling any employee that things would be taken away during negotiations or that things would get worse. I credit Burns' testimony on this point and conclude that she did not threaten employees with adverse changes in working conditions if they chose Union representation.

Complaint Paragraph 16

Complaint paragraph 16, as amended at hearing, alleges that sometime in August 2000, on a date not presently known to the Acting General Counsel but well known to Respondent, Respondent, by its agent Mike McKelvaine, at Respondent's Oneonta, Alabama facility, solicited grievances from employees for

purposes of redress and promised benefits to employees in order to dissuade them from supporting the Union. Respondent denies this allegation.

Before the election, McKelvaine conducted an employee meeting which Sarah Fowler attended. Fowler testified that McKelvaine told the employees that the Union could not help them, that he knew the problems and that he would stick around and help them with their problems. Fowler's testimony is consistent with an affidavit she gave to a Board investigator on January 19, 2001. That affidavit describes an employee meeting that Fowler attended on September 5, 2000, two days before the election. The affidavit states, in part, as follows:

> Mike [McKelvaine] did tell us that he was going to stick around and make things better. He said he would meet with each of us CNAs to talk to us about what we thought was wrong. In the meeting, [Director of Nursing] Glenda [Burns] told us that she knew we had problems and that every business has problems, but she was going to try to make it better.

Fowler's testimony is also consistent with a handwritten statement she prepared on September 9, 2000, only four days after the meeting in question. That document, which also is in evidence, states in part as follows:

> Glenda Burns, Mike [McKelvaine] and Joan Mize stated at that meeting held on Tuesday September 5, 1000 that they know they have a lot of problems but they promise to change and make it better if we just give them a chance.

McKelvaine denied soliciting grievances from employees or promising benefits to employees to dissuade them from supporting the Union. Additionally, employee Erin Dingler testified that she attended one or two of the meetings at which McKelvaine spoke and that he did not discuss employee problems at these meetings.

For several reasons, I credit Fowler's testimony. First, her testimony is consistent with both her pretrial affidavit and with her September 9, 2000 statement. Second, the statement attributed to McKelvaine is consistent with the text of a speech by the highest management official at the Oneonta facility, Executive Director Laurel Massey. In this speech, Massey acknowledged and apologized for mistakes. Then she stated:

> I AM ASKING FOR YOUR SUPPORT. WITH IT I CAN CORRECT THESE MISTAKES AND THEREBY SUPPORT YOU MORE FULLY.

This text at least approaches a promise of benefits. There is but a thin line between asking for employees' support to "correct mistakes" and soliciting employees' grievances and promising to redress them. Respondent conducted a vigorous and coordinated campaign to persuade employees to vote against the Union. It appears likely that McKelvaine elaborated on the same theme as Massey but in doing so, his language crossed the line.

Fowler quoted McKelvaine as saying that he was going to "stick around" and make things better. McKelvaine did act consistently with this statement attributed to him.

For these reasons, as well as my observations of the witnesses, I credit Fowler's testimony and find that McKelvaine did make the statements Fowler attributed to him. Moreover, I conclude that these statements interfered with, restrained and coerced employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1) of the Act.

McKelvaine made these statements in a meeting only two days before the election. I find that the statements constitute objectionable conduct and recommend that the Board set aside the election and direct a new one.

Complaint Paragraph 17

Complaint paragraph 17 alleges that on or about September 5, 2000, Respondent, by its agent Glenda Burns, at Respondent's Oneonta, Alabama facility, promised employees benefits if they refrained from supporting the Union. Respondent denies this allegation.

Employee Sarah Fowler testified that before the election, she attended a meeting at which Director of Nursing Burns spoke. According to Fowler, Burns said that she knew they had problems, that they were working on fixing them, and that the Union wasn't the way to go. Fowler's testimony is consistent with her pretrial affidavit and with the September 9, 2000 statement she wrote four days after the meeting.

Because of this consistency, and based upon my observations of the witnesses, I credit Fowler's testimony. Further, I find that Burns made the statement which Fowler attributed to her.

As stated in *Hill Park Health Care Center*, 334 NLRB No. 55 [328] (June 20, 2001), the "Board recognizes that when an employer institutes a new practice of soliciting employee complaints during an organizational campaign, there is a compelling inference of an implicit promise to correct the inequities discovered and to convince employees that the combination of inquiry and correction will make union representation unnecessary. *DTR Industries*, 311 NLRB 833, 834 (1993)."

In the *Hill Park Health Care Center* case, the employer had distributed to employees a pamphlet informing them of a pre–existing "800" number hotline which they could call to voice their concerns. The Board stated, in part:

> [W]e find that the Respondent's distribution of the pamphlet during the critical period signaled to employees that the Union might not be necessary given the Respondent's willingness to listen to and give consideration to their employment-related concerns.

334 NLRB No. 55 [328] at footnote 2.

In the present case, Complaint paragraph 17 does not allege that Respondent solicited grievances but only that it promised employee benefits if they refrained from supporting the Union. However, it may be noted that Respondent distributed to its supervisors a "Guide to Legal Conduct During a Union Organizing Campaign" which actually did more than inform the supervisors about the law. This "Guide" also embodied the message which management wanted the supervisors to convey to the employees. Thus, it included a section captioned "WHAT YOU CAN AND SHOULD DO." Under this heading, management instructed the supervisors to do, among other things, the following:

> 18. Tell associates [employees] that non-represented associates at the facility are strictly protected by problem solving

> procedures, including the facility's open door policy, hotline, and peer review, all of which are described in the associate handbook.
>
> . . . .
>
> 28. Tell associates that you and other members of management are always willing to discuss with them any subject of interest to them.

Paragraph 18 of the "Guide," quoted above, apparently refers to an "Open Door/Problem Solving Policy" not unlike a grievance procedure in a negotiated collective-bargaining agreement. Respondent had posted this policy on a bulletin board at the facility in May 1998.

I find that Burns told employees that they were working on fixing problems and that the Union was not the way to go, in a context which made an explicit solicitation of their grievances unnecessary. Burns' statement interfered with, restrained and coerced employees in the exercise of Section 7 rights. I recommend that the Board find that it constitutes a violation of Section 8(a)(1) of the Act and objectionable conduct warranting setting the election aside and directing a new one.

Complaint Paragraph 18

Complaint paragraph 18 alleges that sometime during August or September 2000, the exact date presently unknown to the Acting General Counsel but well known to the Respondent, Respondent, by its agent Lollie Massey, at Respondent's Oneonta, Alabama facility, solicited employees to refrain from engaging in support for the Union.

Employee Nora Harper testified that sometime during the union organizing campaign, while she was at the Coke machine to get a soft drink for a resident, Executive Director Massey approached her. No one else was present. According to Harper, Massey asked her to "talk to the ladies" on second shift and get them to change their votes to "no." Harper's testimony is consistent with her pretrial affidavit, which incorporates an earlier statement she had written. In that statement, Harper wrote that "at some point before election date" Massey "ask[ed] me since I was working over all the time to please talk to the girls on 2nd shift to change their votes to '*NO*'!" (Emphasis in original.)

Massey testified that on a couple of occasions, employees—whose names she did not recall—approached her "with comments about 'you know where this business with the Union got started, it was the second shift and somebody needs to talk with them.' And I said 'Yes, I'm aware of that but at this time I don't feel it would be very effective for me to attempt to talk with the second shift but if they chose to do so that's your option.'"

For reasons I have already given, I have doubts about the reliability of some of Harper's testimony. It should be noted that Massey's testimony also does not inspire a lot of confidence. Considering the Respondent's forceful campaign against union representation, and considering Massey's role as the top manager at the facility, it seems a bit implausible for her to forget the names of the employees who came to her with the information that the organizing drive began on the second shift.

Massey's basic message to these employees does sound plausible. Boiled down to the simplest words, she told these employees that she wasn't going to say anything to the second shift employees but if they wanted to, they could.

The General Counsel bears the burden of proof. Because of my doubts about the reliability of some of Harper's testimony, I conclude that the General Counsel has not carried this burden. Rather, crediting Massey, I find that she did not make the remarks attributed to her by Harper. Therefore, I recommend that the Board dismiss the allegations raised in Complaint paragraph 18.

Statement Not Alleged in Complaint

Employee Nora Harper testified that before the election, another employee, Sarah Fowler, was wearing both a Union pin and a "vote no" pin. Harper testified that Supervisor Shelby Walker asked Harper to talk to Fowler and to get Fowler to back off the Union. Harper's pretrial affidavit refers to this matter, although it also implicates Director of Nursing Burns. Specifically, in a handwritten statement attached to the affidavit and incorporated in it, Harper stated as follows:

> At some point before election date Shelby [Walker] and Glenda Burns—D.O.N. ask[ed] me to talk to Sarah Fowler about the union, to try to convince her to back off.

Although the Complaint does not specifically allege this allegation, in certain circumstances the Board may find that unalleged conduct violates the Act, provided that the facts have been fully litigated. Therefore, I believe it is appropriate to make credibility resolutions regarding this matter.

In examining the facts related to Complaint paragraph 15, I did not credit Harper's testimony about a certain statement attributed to Director of Nursing Burns, because the testimony was inconsistent with Harper's pretrial affidavit. Because of this inconsistency, I do not credit Harper's testimony this matter, to the extent it may conflict with that of other witnesses.

It is certainly true that a judge may discredit some portions of the testimony of a witness but credit other portions, and I have done so regarding Harper's testimony. It is also true that Harper's testimony about this matter—namely, that Walker asked Harper to persuade Fowler to back off the union—finds support in her pretrial affidavit. Still, Harper's testimony about this matter and her pretrial affidavit do not coincide completely, and the differences are enough to continue my previous doubts about the reliability of her testimony. Therefore, I do not credit Harper and instead find that neither Walker nor Burns asked Harper to persuade Fowler to back off of her support for the Union.

Summary

To summarize, I have not credited all of the evidence adduced by the General Counsel to establish the allegations in the Complaint. However, the General Counsel has presented sufficient credible evidence to establish the violations of Section 8(a)(1) alleged in Complaint paragraphs 13, 14, 15, 16 and 17, but not the violation alleged in Complaint paragraph 18.

It appears that the violative conduct alleged in Complaint paragraph 13 took place before the critical period. However, the other violations of Section 8(a)(1) did occur within the critical period and constitute objectionable conduct. I recom-

mend that the Board set aside the September 7, 2000 election and direct that a new one be conducted.

The Remedy

In addition to the standard notice posting, the General Counsel seeks an extraordinary remedy, including an order which applies to all of the Respondent's facilities nationwide, a broad cease and desist order, and an order requiring Respondent to send written instructions to all its administrators, managers and supervisors requiring them to comply with the provisions of the Order and Notice. Respondent opposes such a remedy.

Both counsel for the General Counsel and Respondent have submitted briefs on this issue. Each brief cites considerable legal precedent.

Because of the seriousness and complexity of this matter, it is important to review the cited cases and consider the briefs carefully. Therefore, I will defer resolution of this issue until issuing the Certification of Bench Decision, which I will now discuss.

Certification of Bench Decision

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, counsel have demonstrated the highest levels of professionalism and courtesy. Their cooperation has shortened the length of the hearing considerably, and provides an outstanding example of civility. Thank you. The hearing is closed.

Hearing Closed: October 18, 2001 at 5:15 pm

D E C I S I O N

OCTOBER 18, 20014:30 P.M.

JUDGE LOCKE: This is a Bench Decision in the case of Beverly Health and Rehabilitation Services, Inc. and Its Wholly-Owned Subsidiary Beverly Enterprises-Alabama, Inc. D/B/A Beverly Healthcare-Oneonta, which I will call the Employer or Respondent, and United Food and Commercial Workers Union, Local 1657, AFL–CIO, which I will call the Union or the Charging Party. The case numbers are 10–CA–32797, 10–RC–15153.

This Decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the General Counsel has proven most, although not all, of the Section 8(a)(1) allegations in the Complaint. Further, I find that these violations constitute objectionable conduct which warrants setting aside the election and direction of a new one.

Procedural history:

This case concerns events leading up to an election conducted by the National Labor Relations Board, which I will call the Board. The Union filed a representation petition in Case 10–RC–15153 on July 27, 2000. And entered in to a stipulated election agreement with the Employer, which provided for a secret ballot election in which employees in the following unit were eligible to vote. All full time and regular part time nursing assistants, cooks, dietary aides, housekeeping, laundry employees, central supply clerk, Activity Department assistants, and Maintenance assistants employed by the Employer at it's 215 Valley Road Oneonta, Alabama facility, but excluding all registered nurses, licensed practical nurses, Activity Department Director, Social Services Coordinator, registered dietician, dietary manager, Maintenance supervisor, department heads, office clerical employees, temporary and casual employees, professional employees, guards, managers, and supervisors as defined in the Act.

On September 7, 2000 the Board conducted a secret ballot election. The tally of ballots showed that that of approximately seventy (70) eligible voters thirty-two (32) cast valid votes for and thirty-four (34) cast valid votes against the Union. There was one challenged ballot and one void ballot. The challenged ballots were not sufficient in number to affect the results of the election.

On September 12, 2000 the Union filed timely objections to the election, which were duly served on the Employer. On November 29, 2000 the Union filed an unfair labor practice charge against the Employer in Case 10–CA–32797. On March 30, 2001, after investigation of the charge, the Regional Director of Region 10 issued a Complaint and Notice of Hearing, which I will call the Complaint.

In issuing this Complaint the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government. The Complaint and the Union's objections to the election concern the same alleged acts. The Complaint alleges these acts to be unfair labor practices. The objections assert that this same alleged conduct tainted the September 7, 2000 election and that the Board should set this election aside and conduct a new one.

On April 19, 2001 the Regional Director of Region 10 issued an Order which consolidated Case 10–RC–15153 with Case 10–CA–32797 and directed a hearing before an Administrative Law Judge.

On October 17, 2001 that hearing opened before me in Birmingham, Alabama. After the General Counsel and Respondent had presented evidence counsel for each gave oral argument. Today, October 18, 2001, I am issuing this Bench Decision.

Admitted allegations:

Respondent's answer to the Complaint admitted a number of allegations. Based on these admissions I find that the General Counsel has proven the allegations raised in Complaint Paragraphs 1(a), 1(b), 3, 4, 5, 6, 7, 10, 11, and 12. More specifically, I find that at all material times Respondent Beverly Health and Rehabilitation Services, Inc. and each of its wholly-owned subsidiaries and individual facilities identified in the Complaint was an employer engaged in commerce within the meaning of Section 226 and 7 of the Act. And that each was a healthcare institution within the meaning of Section 214 of the Act.

Further, I find that at all material times the Charging Party has been a labor organization within the meaning of Section 25 of the Act.

Additional, I find that the following individuals are Respondent's supervisors within the meaning of Section 2(11) of the Act, and it's agents within the meaning of Section 2(13) of the Act: licensed practical nurses Jerry Nichols, Shelby Walker, and Joan Mize, Alabama Group Human Resources Manager Mike McKelvaine, Oneonta Facility Director of Nursing Glenda Burns, Oneonta Facility Executive Director Laurel "Lolly" Massey.

Respondent's status as single integrated enterprise:

Respondent's answer partially denies the allegations raised in Complaint Paragraphs 2, 8, and 9, which pertain to the relationship between Respondent and it's wholly-owned subsidiaries and individual facilities. Referring to Beverly Health and Rehabilitation Services, Inc. as Respondent BHR Complaint Paragraph 8 alleges as follows. "At all material times herein Respondent BHR and its wholly-owned subsidiaries, including Respondent Oneonta and individual facilities, and each of them have been affiliated business enterprises with common officers, ownership directors, management, and supervision, have formulated and administered a common labor policy effecting employees of said operations. Have shared common premises and facilities, have provided services for each other, have interchanged personnel with each other, and have held themselves out to the public as a single integrated business enterprise."

Complaint Paragraph 9 alleges as follows. "By virtue of its operations described above Respondent BHR and it's wholly-owned subsidiaries, including Respondent Oneonta, and individual facilities, constitute a single integrated business enterprise and a single employer within the meaning of the Act."

At hearing the General Counsel and Respondent entered into a stipulation regarding these allegations. The stipulation states in part as follows. "Respondent, although it still contends that it is not a single integrated employer for a National Labor Relations Act purposes, or any other purposes, hereby acknowledges, stipulates and agrees that the issue of Respondent's single employer status under the National Labor Relations Act is res adjudicata. Pursuant to the administrative and judicial determinations made on full records which are substantially similar to the facts as they are now. Respondent expressly consents to a finding in the above referenced case by the National Labor Relations Board and any reviewing court that its nursing home operations are a single integrated employer for National Labor Relations Act purposes. Both Respondent and Counsel for the General Counsel hereby expressly acknowledge that this stipulation does not constitute a waiver by Beverly of any other arguments regarding the propriety of the nationwide cease and desist order sought by the General Counsel. Both Respondent and Counsel for the General Counsel hereby expressly acknowledge that this stipulation has no affect whatsoever beyond the case captioned here and above."

Based upon this stipulations and the record as a whole I find that Respondent Beverly Health and Rehabilitation Services, Inc. and it's Wholly-Owned Subsidiaries, including Respondent Oneonta and individuals facilities constitute a single integrated business enterprise, and a single employer within the meaning of the Act as alleged in Complaint Paragraph 9.

Legal standards to be applied:

In determining whether statements by Respondent's representatives interfere with, restrain or coerce employees in the exercise of Section 7 rights I will apply an objective standard. Under this standard the intent of the person who made the statement is not relevant. Neither is the affect of the statement on a particular person. In other words, it is irrelevant that a statement may not have chilled the Union activities of the person who heard it, or changed the way this employee voted in the election. Rather, the lawfulness of the statement must be judged by the effect it reasonably would have on employees. In determining whether a particular statement constitutes objectionable conduct warranting sitting aside the election I will apply a similar objective standard. See *Hopkins Nursing Care Center*, 309 NLRB 958, 1992.

Unfair labor practice allegations, Complaint Paragraph 13:

Complaint Paragraph 13 alleges that on or about June 27, 2000 Respondent by it's agent Jerry Nichols at Respondent's Oneonta, Alabama facility coercively interrogated employees regarding their Union sentiments and desires and the Union's sentiments and desires of other employees. Respondent denies this allegation.

Respondent's employee Juanita Middlebrooks, a nursing assistant, testified that on one occasion when she came out of a patient's room licensed practical nurse Nichols called her over to the medicine cart where he was standing. According to Middlebrooks Nichols asked if she knew who was behind bringing the Union in. Middlebrooks replied that she wouldn't say. Middlebrooks testified that Nichols said, "You can tell me, I won't tell nobody," but that she just walked away.

When Nichols testified Respondent asked him if he "had any occasion" to ask employees about other employees' Union activities. Nichols answered tersely and simply, no. When asked specifically if he "had occasion to speak to Juanita Middlebrooks" about how other employees felt about the Union he answered, "No, not myself, no." I do not credit Nichols' denial. At the time they testified both Nichols and Middlebrooks were still employed by Respondent.

Therefore, they both had some incentive to testify in a manner favorable to Respondent. Yet Middlebrooks' testimony could result in a finding that Respondent violated the law. Middlebrooks would have no reason to give such testimony if it were not true.

Moreover, Nichols denial is rather vague. Nichols denied having occasion to ask Middlebrooks about the Union activities of other employees. Such denial is not quite the same as denying that he actually did ask Middlebrooks the question. Additional, based on my observations of the witnesses, I conclude that Middlebrooks was more credible. For all these reasons I credit her testimony rather than Nichols and find that Nichols did make the statement which Middlebrooks attributed to him.

In determining whether Nichols question to Middlebrooks violated the Act I draw on the guidance of *SAIA Motor Freight, Inc.*, 334 NLRB 124 [979], August 7, 2001. As discussed in

that case, to determine whether an interrogation violated the Act the Board considers the following factors: the background in which the questioning occurs, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether the employee involved was an open and active Union supporter.

Several of these factors militate in favor of fighting the questioning violative. When Nichols interrogated Middlebrooks the Union was trying to organize the employees. Nichols sought the identify of the individuals behind the Union's effort. Nichols was and admitted supervisor and agent of Respondent who attended meetings at which other supervisors discussed the Union organizing drive. Further, the record fails to establish that Middlebrooks was an open and active Union supporter.

All of these facts suggest that the questioning interfered with the restrained and coerced employees in the exercise of their Section 7 rights. On the other hand, the interrogation did not take place in the locus of management authority. Rather, Nichols posed the question to Middlebrooks in the hallway of the facility next to the medicine cart. Additional, Nichols is not a higher management official, but a firstline supervisor.

I conclude that the factors militating in favor of finding a violation outweigh those against finding a violation. In the context of a Union organizing campaign questioning an employee about the identify of Union supporters is highly coercive. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act as alleged in Complaint Paragraph 13.

Complaint Paragraph 14:

Complaint Paragraph 14, as amended at hearing alleges that sometime during the period July 1, 2000 to September 7, 2000, the exact date presently unknown to the Acting General Counsel, but well known to Respondent, Respondent by its agent Mike McKelvaine at Respondent's Oneonta, Alabama facility, threatened employees that they would lose benefits if they supported the Union. Respondent denies this allegation.

During the Union organizing campaign management held meetings to present its position to employees. The Alabama Group Human Resources Manager Mike McKelvaine conducted or participated in some of these meetings. Respondent has admitted that McKelvaine is its supervisor and agent. McKelvaine denied telling employees that they would lose benefits if they selected the Union.

While working at Respondent's facility nursing assistant Nora Harper attended some of these meetings. According to Harper McKelvaine told the employees attending that if the Union came in they would lose the Blue Cross-Blue Shield insurance and they would have to get the Union insurance, which wasn't as good as Blue Cross.

Harper's pre-trial affidavit, which was placed in evidence, is consistent with her testimony at hearing. Based on this consistency, as well as my observations of the witnesses as they testified, I credit Harper's testimony about this matter.

Another nursing assistant Sarah Fowler also attended meetings at which McKelvaine spoke. Fowler testified that McKelvaine told employees that their insurance would not be the same, and that some benefits would change if the Union were selected. Fowler gave a pre-trial affidavit and also provided General Counsel another handwritten statement. These statements do not mention McKelvaine telling employees that their insurance would not be the same, or that some benefits would change. Moreover, her affidavit states that McKelvaine "did not make any specific promises or threats."

In some circumstances the difference between Fowler's testimony and her pre-trial affidavit might raise questions about the reliability of her testimony. These circumstances are not present here. Although her affidavit does state that McKelvaine did not make any specific threats it does not elaborate on the meaning of the word threat. Ordinarily that word carries a somewhat menacing connotation and it is not clear that the affiant would consider a statement about a change in insurance benefits to be the kind of overtly hostile behavior commonly associated with a threat. Based on my observations of the witnesses I conclude that Fowler's testimony is reliable and I credit it.

Another nursing assistant Janet Sherbet testified that she attended at which McKelvaine spoke. According to Sherbet, "We could lose a lot of our benefits if we got a Union in there when they were negotiating contracts, and just things like that, if we had problems, that they could work them out somehow."

Respondent called a nursing assistant Erin Bingler, who attended one or two of the meetings conducted by McKelvaine. She testified that McKelvaine did not discuss what would happen to benefits if the employees selected a Union. She also did not recall McKelvaine mentioning insurance.

In examining this testimony it is important to keep in mind that Respondent conducted a number of meetings at which McKelvaine spoke. But McKelvaine said at a meeting attended by one witness might not be identical to what he said at another meeting attended by other witnesses. Thus the fact that employee Bingler did not hear McKelvaine make a violative statement does not foreclose the possibility that he did so at another meeting she did not attend.

Relying on Harper's testimony, which I credit, I find that at a meeting she attended McKelvaine told employees that if the Union came in they would lose the Blue Cross-Blue Shield insurance and that they would have to get the Union insurance which wasn't as good as Blue Cross.

The record does not establish that McKelvaine made any statement to qualify or explain a change of insurance benefits as simply a possibly outcome of the collective bargaining process. To the contrary, Harper reported McKelvaine as making a flat statement that employees would lose their Blue Cross-Blue Shield insurance and would have to obtain the Union's insurance, which wasn't as good. Clearly that was the message communicated to Harper, and the message she understood.

Similarly the credited testimony of Sarah Fowler establishes that at a meeting she attended McKelvaine said that if the Union were selected the employees' insurance would not be the same, or that some benefits would change. Again, Fowler's testimony does not show that McKelvaine described this change as a possibly outcome of the collective bargaining process rather than the inevitable result of selecting the Union.

I conclude that the statements McKelvaine made to employees at the meetings attended by Harper and Fowler interfered

with restrained and coerced employees in exercise of their Section 7 rights. Therefore, I recommend that the Board find that these statements violated Section 8(a)(1) of the Act. Further, I recommend that that Board find that these statements made during the critical period warrant setting aside the election and directing that another be conducted.

On the other hand I do not conclude that McKelvaine violated the Act by making the statement attributed to him by employee Sherbet. She testified that McKelvaine told the employees "we could lose a lot of our benefits if we got a Union in there when they were negotiating contracts." Based upon my observations of the witnesses I find that Sherbet testified honestly, but that her mind had abstracted and condensed McKelvaine's comments considerably before it saved them to long term memory.

Her recollection that McKelvaine told employees they could lose a lot of benefits "when they were negotiating contract" suggests that on this occasion McKelvaine did explain that a change in benefits could result from the bargaining process. Sherbet's recollection standing alone is not sufficient to support a finding that Respondent violated the Act. I do not rely upon it in concluding that Respondent committed the unfair labor practice alleged in Complaint Paragraph 14.

Complaint Paragraph 15:

Complaint Paragraph 15 alleges that sometime in August and September 2000 on dates not presently known to the Acting General Counsel, but well known to Respondent, Respondent by its agents Shelby Walker and Glenda Burns at Respondent's Oneonta, Alabama facility threatened employees with adverse changes in working conditions if they chose Union representation. Respondent denies this allegation.

Respondent has admitted that Walker is its supervisor and agent. Walker schedules employees for work. To request a day off a nursing assistant goes to Walker who typically grants the request. Sarah Fowler testified that on one occasion she requested that Walker give her a day off. According the Fowler Walker granted the request, but said that once the Union got in the schedule would remain the same, and that she, Walker, would not be able to change it. Fowler provided a consistent account of this incident in her pre-trial affidavit.

Walker denied making this statement to Fowler. Based upon my observations of the witnesses I credit Fowler's testimony and find that Walker did make the statement which Fowler attributed to her. Further, I conclude that this statement that once the Union got in the schedule would remain the same, and that she, Walker, would not be able to change it interferes with, restrains, and coerces employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act. Walker did not qualify the statement to indicate that as a result of the collective bargaining process certain benefits and working conditions would change. Rather Walker linked the change in benefits directly to the selection of the Union.

Additionally, Walker made this statement during the critical period. I recommend that the Board find that the statement constitutes objectionable conduct warranting setting aside the election and directing a new one.

Employer Janet Sherbet testified that the day before the election she heard Walker tell another employee that she, Walker, had four weeks vacation and "would sure hate to lose it. If the Union came in, she felt like she would." Sherbet further testified that during this same conversation Walker told the other employee "that if we got the Union in that it would be run more like a business, it wouldn't be like a family place anymore."

Sherbet quoted Walker as saying that the nurses had been told they wouldn't be able to "pal around" with the nursing assistants, because the Union "might do something to them if they did." According to Sherbet Walker said that "we could lose a lot of our benefits if they got the Union in there, that we may have our vacation days and our holidays. We got cheaper lunches and just different things that we already have now, that we could lose them if the Union came in negotiating a contract."

Rather emphatically Walker testified that she never discussed anything with Sherbet because "she was not the type to discuss anything with", and because Sherbet was angry most of the time. But Walker's denial that she discussed the Union with Sherbet is not quite a denial that she made the statements which Sherbet attributed to her. Sherbet did not testify that Walker made the statements directly to her, Sherbet, but rather that Walker made the statements to another employee in Sherbet's presence.

Walker's testimony falls short of a flat denial in another respect. She testified that she did not recall making any statements concerning the way a Union's presence would affect the relationships between employees and supervisors. But she admitted saying that "we would have a third party that would, you know, be in between everybody."

Considering that Walker did not firmly deny the statements attributed to her by Sherbet, and based upon my observations of the witnesses I credit Sherbet's testimony rather than Walker's. Relying on that testimony I find that Walker told employee that if the Union came in the facility would be run more like a business and wouldn't be a "family place" anymore. Further, I find that Walker said that the nurses had been told that if the Union came in the nurses would not be able to "pal around" with the nursing assistants, because the Union might "do something" to them.

If Walker's comments that the facility would be run "more like a business", and would not be a "family place" anymore stood by themselves, I would not recommend that the Board find a violation. However, they must be considered in light of Walker's additional statement that the nurses would not be able to "pal around" with the nursing assistants, because the Union might "do something" to them.

This latter statement clearly conveys any change in the family atmosphere of the staff would result not from structure imposed by a negotiated collective bargaining agreement, but from Union action directed at the nurses. The statement that the Union might "do something" to the nurses implies that the Union would act with malicious intent to destroy friendships rather than from legitimate purpose related to collective bargaining.

In these circumstances I conclude that Walker's comments violate Section 8(a)(1) of the Act. Further I conclude that they interfere with the laboratory conditions necessary for free and uncoerced choice. Because Walker made the statements during the critical period I recommend that the Board find them to constitute objectionable conduct.

Based on Sherbet's credited testimony I have also found that Walker told an employee "we could lose a lot of our benefits if they got the Union in there, that we may have our vacation days and our holidays. We got cheaper lunches and just different things that we already have now, that we could lose them if the Union came in negotiating a contract. Walker did not say that the employee would lose benefits, but only that they could. And she tied such possible changes to negotiations for a collective bargaining agreement.

I conclude that the statement falls short of interfering with restraining or coercing the employees in the exercise of Section 7 rights. I do not recommend that the Board find that this statement violates Section 8(a)(1), or constitutes objectionable conduct.

Employee Nora Harper testified that Director of Nursing Glenda Burns commented to her that if the Union came in things would "only get worse", and that in bargaining if the Union "got something they would only take something away." Harper's pre-trial affidavit and her handwritten statement attached to it do not mention Burns making this statement Harper described in her testimony. Moreover, Harper's affidavit states in part as follows: "Attached in this affidavit is a two-page handwritten statement which I prepared. The information in that statement is true and accurate to the best of my knowledge and belief. Other than the above I have not heard any Beverly supervisor, manager, or other official say anything to anyone or ask anyone about the Union."

Thus Harper's affidavit contradicts her testimony. Therefore, I do not credit her testimony on this point, although, as already noted, I credited her testimony on another point.

Burns testified that she recalled having a conversation in which she discussed benefits with an employee. But she was not sure whether that employee was Nora Harper. According to Burns she told the employee that if a Union were selected benefits would be negotiated. She denied telling any employee that things would be taken away during negotiations, or that things would get worse.

I credit Burns' testimony on this point and conclude that she did not threaten employees with adverse changes in working conditions if they chose Union representation.

Complaint Paragraph 16:

Complaint Paragraph 16, as Amended at Hearing, alleges that sometime in August 2000 on a date not presently known to the Acting General Counsel, but well known to Respondent, Respondent by its agent Mike McKelvaine at Respondent's Oneonta, Alabama facility solicited grievances from employees for purposes of redress and promised benefits to employees in order to dissuade them from supporting the Union. Respondent denies this allegation.

Before the election McKelvaine conducted an employee meeting which Sarah Fowler attended. Fowler testified that McKelvaine told the employees that the Union could not help them, that he knew the problems and that he would stick around and help them with their problems. Fowler's testimony is consistent with an affidavit she gave to a Board investigator January 19, 2001.

That affidavit describes an employee meeting that Fowler attended on September 5, 2000, two days before the election. The affidavit states in part as follows: "Mike McKelvaine did tell us that he was going to stick around and make things better. He said he would meet with each of us CNA's to talk to us about what we thought was wrong. In the meeting Director of Nursing Glenda Burns told us that she knew we had problems, and that every business has problems. But she was going to try to make it better."

Fowler's testimony is also consistent with a handwritten statement she prepared on September 9, 2000, only four days after the meeting in question. That document, which also is in evidence, states in part as follows: "Glenda Burns, Mike McKelvaine, and Joan Mize stated that that meeting held on Tuesday, September 5, 2000, that they know they have a lot of problems, but they promised to change and make it better if we just give them a chance."

McKelvaine denied soliciting grievance from employees, or promising benefits to employees the dissuade them from supporting the Union. Additional, Employee Erin Bingler testified that she attended one or two of the meetings at which McKelvaine spoke, and that he did not discuss employee problems at these meetings.

For several reasons I credit Fowler's testimony. First, her testimony is consistent with both her pre-trial affidavit and with her September 9, 2000 statement. Second, the statement attributed to McKelvaine is consistent with the text of a speech by the highest management official at the Oneonta facility, Executive Director Laurel Massey. In this speech Massey acknowledged and apologized for mistakes. Then she stated, "I am asking for your support. With it I can correct these mistakes and thereby support you more fully."

This text at least approaches a promise of benefits. There is but a thin line between asking for employees' support to "correct mistakes", and soliciting employees' grievance and promising to address them. Respondent conducted a vigorous and coordinated campaign to persuade employees to vote against the Union. It appears likely that McKelvaine elaborated on the same theme as Massey, but in doing so his language crossed the line.

Fowler quoted McKelvaine as saying that he was going to "stick around" and make things better. McKelvaine did act consistently with this statement attributed to him. For these reasons, as well as my observations of the witnesses, I credit Fowler's testimony and find that McKelvaine did make these statements Fowler attributed to him. Moreover, I conclude that these statements interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, and thereby violated Section 8(a)(1) of the Act.

McKelvaine made these statements in a meeting only two days before the election. I find that the statements constitute objectionable conduct and recommend that the Board set aside the election and direct a new one.

Complaint Paragraph 17:

Complaint Paragraph 17 alleges that on or about September 5, 2000 Respondent by its agent Glenda Burns at Respondent's Oneonta, Alabama facility promised employees benefits if they refrained from supporting the Union. Respondent denies this allegation.

Employee Sarah Fowler testified that before the election she attended a meeting at which Director of Nursing Burns spoke. According to Fowler Burns said that she knew that they had problems, that they were working on fixing them, and that the Union wasn't the way to go. Fowler's testimony is consistent with her pre-trial affidavit and with the September 9, 2000 statement she wrote four days after the meeting. Because of this consistency and based upon my observations of the witnesses I credit Fowler's testimony. Further, I find that Burns made the statement which Fowler attributed to her.

As stated in Hill Park Healthcare Center, 334 NLRB 55, June 20, 2001, the "Board recognizes that when an employer institutes a new practice of soliciting employee complaints during an organizing campaign there is a compelling inference of an implicit promise to correct the inequities discovered and to convince employees that the combination of inquiry and correction will make Union representation unnecessary. *DTR Industries,* 311 NLRB 833–834, 1993."

In the *Hill Park Health Center* case the Employer had distributed to employees a pamphlet informing them of a preexisting 800 number Hotline, which they could call to voice their concerns. The Board stated in part, "We find that the Respondent's distribution of the pamphlet during the critical period signaled to employees that the Union might not be necessary given the Respondent's willingness to listen to and give consideration to their employment related concerns." 334 NLRB [No.] 55 [328] at Footnote 2.

In the present case Complaint Paragraph 17 does not allege that Respondent solicited grievances, but only that it promised employee benefits if they from supporting the Union. However, it may be noted that Respondent distributed to its supervisors a "guide to legal conduct during a Union organizing campaign" which actually did more than inform the supervisors about the law.

This guide also embodied the message which management wanted the supervisors to convey to the employees. Thus it included a section captioned "What You Can And Should Do." Under this heading management instructed the supervisors to do, among other things, the following:

18. Tell associates—employees—that non-represented associates at the facility are strictly protected by problem solving procedures. Including the facilities open door policy, hot line and peer review, all of which are described in the associate handbook.

20. Tell associates that you and other members of management are always willing to discuss with them any subject of interest to them."

Paragraph 18 of the guide quoted above apparently refers to a "open door problem solving policy" not unlike a grievance procedure in the negotiated collective bargaining agreement. Respondent had posted this policy on a bulletin board at the facility in May 1998.

I find that Burns told employees that they were working on fixing problems and that the Union was not the way to go in a context which made an explicit solicitation of their grievances unnecessary. Burns' statement interfered with, restrained, and coerced employees in the exercise of Section 7 rights. I recommend that the Board find it constitutes a violation of Section 8(a)(1) of the Act and objectionable conduct warranting setting the election aside and directing a new one.

Complaint Paragraph 18:

Complaint Paragraph 18 alleges that someone—sometime during August or September 2000, the exact date presently unknown to the Acting General Counsel, but well known to the Respondent, Respondent by it's agent Lolly Massey at Respondent's Oneonta, Alabama facility solicited employees to refrain from engaging in support for the Union.

Employee Nora Harper testified that sometime during the Union organizing campaign, while she was at the Coke machine to get a soft drink for a resident, Executive Director Massey approached her. No one else was present. According to Harper Massey asked her to "talk to the ladies" on second shift and get them to change their votes to no. Harper's testimony is consistent with her pre-trial affidavit, which incorporates an earlier statement she had written. In that statement Harper wrote that "at some point before election date" Massey "asked me, since I was working over all the time to please talk to the girls on second shift to change their votes to no." Emphasis in original.

Massey testified that on a couple occasions employees, whose names she did not recall, approached her " with comments about, you know where this business with the Union got started. It was the second shift and somebody needs to talk with them." And I said, "Yes, I'm aware of that, but at this time I don't feel it would be very effective for me to attempt to talk with the second shift. But if they chose to do so, that's your option."

For reasons I have already given I have doubts about the reliability of some of Harper's testimony. It should be noted that Massey's testimony also does not inspire a lot of confidence. Considering the Respondent's forceful campaign against Union representation and considering Massey's role as the top manager at the facility it seems a bit implausible for her to forget the names of employees who came to her with the information that the organizing drive began on the second shift.

Massey's basic message to these employees does sound plausible. Boiled down to the simplest words she told these employees that she wasn't going to say anything to the second shift employees, but that if they wanted to, they could. The General Counsel bears the burden of proof. Because of my doubts about the reliability of some of Harper's testimony I conclude that the General Counsel counsel has not carried this burden. Rather crediting Massey I find that she did not make the remarks attributed to her by Harper. Therefore, I recommend that the Board dismiss the allegations raised in Complaint Paragraph 18.

Statement not alleged in Complaint:

Employee Nora Harper testified that before the election another employee, Sarah Fowler, was wearing both a Union pin and a "Vote No" pin. Harper testified that Super Shelby Walker asked Harper to talk to Fowler, and to get Fowler to back off the Union. Harper's pre-trial affidavit refers to this matter. Although it also implicates Director of Nursing Burns. Specifically in a handwritten statement attached to the affidavit, and incorporated in it, Harper stated as follows. "At some point before election date Shelby Walker and Glenda Burns, DON, asked me to talk to Sarah Fowler about the Union to try to convince her to back off."

Although the Complaint does not specifically allege this allegation, in certain circumstances the Board may find that unalleged conduct violates the Act. Provided that the facts have been fully litigated. Therefore, I believe that it is appropriate to make credibility resolutions regarding this matter.

In examining the facts related to Complaint Paragraph 15 I did not credit Harper's testimony about a certain statement attributed to Director of Nursing Burns, because the testimony was inconsistent with Harper's pre-trial affidavit. Because of this inconsistency I do not credit Harper's testimony regarding this matter to the extent it may conflict with that of other witnesses. It is certainly true that a Judge may discredit some portions of the testimony of a witness, but credit other portions. And I have done so regarding Harper's testimony.

It is also true that Harper's testimony about this matter, namely that Walker asked Harper to persuade Fowler to back off the Union, finds support in her pre-trial affidavit. Still, Harper's testimony about this matter, and her pre-trial affidavit do not coincide completely. And the differences are enough to continue my previous doubts about the reliability of her testimony. Therefore, I do not credit Harper, and instead find that neither Walker, nor Burns asked Harper to persuade Fowler to back off of her support for the Union.

Summary:

To summarize I have not credited all of the evidence adduced by the General Counsel to establish the allegations in the Complaint. However, the General Counsel has presented sufficient credible evidence to establish the violations of Section 8(a)(1) alleged in Complaint Paragraphs 13, 14, 15, 16, and 17, but not the violation alleged in Complaint Paragraph 18. It appears that the violative conduct alleged in Complaint Paragraph 13 took place before the critical period. However, the other violations of Section 8(a)(1) did occur within the critical period, and constitute objectionable conduct.

I recommend that the Board set aside the September 7, 2000 election and direct that a new be conducted.

The Remedy:

In addition to the standard Notice posting the General Counsel seeks an extraordinary remedy. Including an Order which applies to all of the Respondent's facilities nationwide, a broad Cease and Desist Order. And an Order requiring Respondent to send written instructions to all its administrators, managers, and supervisors requiring them to comply with the provisions of the Order and Notice. Respondent opposes such a remedy.

Both counsel for the General Counsel and Respondent have submitted briefs on this issue. Each brief cites considerable legal precedent. Because of the seriousness and complexity of this matter it is important to review the cited cases and consider the briefs carefully. Therefore, I will defer resolution of this issue until issuing the Certification of Bench Decision, which I will now discuss.

Certification of Bench Decision:

When the transcript of this proceeding has been prepared I will issue a certification which attaches as an Appendix the portion of the transcript reporting this Bench Decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order, and notice. When that certification if served upon the parties the timeperiod for filing an appeal begin to run.

Throughout this proceeding counsel have demonstrated the highest levels of professionalism and courtesy. Their cooperation has shortened the length of the hearing considerably and provides an outstanding example of civility.

Thank you.

The hearing is closed.

(Whereupon, the hearing in the above entitled matter was closed at 5:20 p.m.)

C E R T I F I C A T E

This is to certify that the attached proceedings
before the National Labor Relations Board, Region Ten

In the Matter of:

BEVERLY HEALTH AND
REHABILITATION SERVICES,
INC. AND ITS WHOLLY-OWNED
SUBSIDIARY BEVERLY Case No.
ENTERPRISES-ALABAMA, INC.
D/B/A BEVERLY HEALTH-
CARE-ONEONTA
a single employer

and 10-CA-32797

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1657, AFL-CIO

BEVERLY ENTERPRISES-ALABAMA
INC. d/b/a BEVERLY HEALTH-
CARE-ONEONTA

And 10-RC-15153

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1657

Date:OCTOBER 18, 2001

Place:BIRMINGHAM, ALABAMA

were held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

Joe Swiney

OFFICIAL REPORTER